Supreme Court of the United States

OCTOBER TERM, 1956.

OCT 5 1956
JOHN T. FEY, Clerk

No. 480

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS and WALTER McVEAY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ALBERT SIDNEY JOHNSTON, JR.,
Suite 3-5 Schwan Building,
Biloxi, Mississippi,
Counsel for Petitioners.

HOWARD A. McDONNELL, Esq.,
Barq Building,
Biloxi, Mississippi,
C. PAUL BARKER, Esq.,
Carondelet Building,
New Orleans, Louisiana,
Of Counsel.

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	5
STATEMENT	5
A. The Basic Facts	5
B. The Labor Union Group Issue	10
C. The Employer-Employee Relationship Issue	11
D. The Decision of the Court of Appeals	12
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	24
APPENDIX, A—OPINION BELOW	27
APPENDIX, B—JUDGMENT BELOW	42
APPENDIX, C—STATUTES INVOLVED	43

AUTHORITIES.

PAGE

Cases:

Allen Bradley Co., et al. v. Local Union No. 3, etc., 325 U. S. 797, 65 S.Ct. 1533 ..... 17, 18, 24
Gianfalo v. Texas Co., ... US ...., 76 S.Ct. 141 22
Local 36 v. United States, 9th Cir., 177 F.2d 320, 336 18
Loe v. Goldstein, CA9, 101 F.2d 967 22
McKelvy v. United States, 260 U. S. 353, 357 .. 20
Nolan v. General Sea Foods Corp., CA-1, 112 F.2d 515 22
Osland v. Star Fish & Oyster Co., CA-5th, 197 F.2d 113, 114 22
Southern Shell Fish Co., Inc., et al. v. Plaisance, CA-5th, 196 F.2d 312, 314 22
Sutton v. U. S., 157 F.2d 661, CA-5 17
Truck Drivers' Local No. 421, etc. v. United States, 8th Cir., 128 F.2d 227, 232, 233.... 17, 18
United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 ..... 11, 21
U. S. v. Bradford, CA-2, 1952, 194 F.2d 197, cert. den., 343 US 979 18
United States v. Hutcheson, 312 U. S. 219, 61 S.Ct. 463, 466 ..... 17, 18, 19, 20, 23, 24
Vanderbilt v. Commissioner of Internal Revenue, 93 F.2d 360 19
United States v. American Tobacco Co., 211 U.S. 106, 180, 181 18

Federal Statutes:

Clayton Act, Section 20 ..... 16, 17, 18, 19, 20, 24
Norris-LaGuardia Act, Sections 6, 13 ..... 16, 17, 19, 20, 21, 24
Sherman Act, Section 1 25

PAGE

U. S. Constitution:
5th Amendment 25
6th Amendment 25
Mississippi Code of 1942, Section 6131 7

Miscellaneous:
Federal Rules of Criminal Procedure, Rules 7(c), and 34 ..... 17, 18

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. .....

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS and WALTER McVEAY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Gulf Coast Shrimpers and Oystermans Association, Louis S. Simmons and Walter McVeay, the petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on September 6, 1956.

OPINIONS BELOW.

The case was tried to a jury in the District Court and no opinion was delivered by the District Judge. The opinion of the Court of Appeals (*infra*, Appendix A, pp. 27-41) has not been reported to date.

JURISDICTION.

The Court of Appeals for the Fifth Circuit affirmed the conviction of petitioners.

The judgment of the Court of Appeals was entered on September 6 ,1956 (*infra*, Appendix B, p. 42). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, where an incorporated Association and its officers are charged in an indictment, as such, with conspiring to violate the Sherman Act with "others to the Grand Jurors unknown," and the corporate charter, its constitution and by-laws, show such Association and its officers and members to be a labor organization and laborers, does such indictment charge a crime under the law, without also charging the "others to the Grand Jurors unknown," were non-labor groups and were themselves violating the Sherman Act.

2. Whether, where such Association and its officers and directors are shown by the corporate charter, constitution and by-laws, to be a labor group, and indicted with "others to the Grand Jurors unknown," the proof may be considered as supplying allegations that such others to the grand jurors unknown were a non-labor group, constituting the "essential facts of the matter," as required by Rule 7(c), of the Federal Rules of Criminal Procedure.

3. Whether, where a labor group, an incorporated Association and its officers and directors, are charged with violation of Section 1 of the Sherman Act, as having conspired with "others to the Grand Jurors unknown," such indictment may be held sufficient, without also reading and applying, as a harmonizing text, Section 20 of the Clayton Act, and Section 6 of the Norris-LaGuardia Act.

4. Whether, in a prosecution under the Sherman Act, against an incorporated Association and its officers and directors, shown to be a labor group, the trial judge may decide, as a matter of law, that the members of such defendant Association are not employees of the packer "dealers" mentioned in the indictment charging conspiracy to violate the Sherman Law, but joint adventurers, and fail to submit to the jury the question of fact as to the employer-employee relationship.

5. Whether, where the defense of the corporate Association and its members, jointly indicted for conspiracy to violate the Sherman Act, was that they were a labor union and a labor group, the requested instructions of such

defendants as to their limited liability, under Section 20 of the Clayton Act, and Section 6 of the Norris-LaGuardia Act, were properly and lawfully refused; and, further, whether without requests for such instructions, the trial judge should so instruct the jury.

6. Whether, where the evidence is to the effect that fishermen crew-members of defendant incorporated Association, received a "lay" share of the catch of shrimp and oysters in lieu of wages, at certain price(s) per barrel, a jury question is posed whether such fishermen were seamen-employees under the Jones Act, entitled to lien for wages, and employees of the packer "dealers" referred to in the indictment returned against them.

7. Whether, where in a prosecution against a proven labor group, being an incorporated Association and its members, officers and directors, the prosecution introduced in evidence the corporate charter, its constitution and by-laws, the defense that the defendants were a union and a labor group, and the controversy concerned terms and conditions of employment, and the term "labor dispute" as defined in Section 13 of the Norris-LaGuardia Act, is "any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee," such contention is the matrix of the controversy, and posed a jury question requiring requested instructions as to such employer-employee relationship, and further instructions as to the defendants limited liability under Section 20 of the Clayton Act, and Section 6 of the Norris-LaGuardia Act.

STATUTES INVOLVED.

The statutes involved are set out in Appendix C, *infra*, pp. 43-46.

STATEMENT.

A. The Basic Facts. The indictment filed in the District Court for the Southern District of Mississippi, in five separate sections, (R. 2-11) containing paragraphs numbered 1 to 13, inclusive, defines the terms used therein, names the Defendants, the trade and commerce involved, the alleged combination and conspiracy in restraint of trade, the effects of said alleged conspiracy, and the jurisdiction and venue. It is alleged, in Section II, Paragraph 2, that the petitioner Association was incorporated under the laws of the State of Mississippi on October 10, 1932, and charges that "(t)he defendants named herein, *together with other persons to the Grand Jurors unknown*, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the hereinabove described trade and commerce among the several states and with foreign nations in shrimp and oysters in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, * * * commonly known as the Sherman Act," and "(t)he aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the Defendants *and others* to the Grand Jurors unknown, * * *." (Emphasis supplied.)

The history and nature of the fishing industry in Mississippi are shown in respondent's Exhibit 16, to the testimony of Henry M. Stuckey, Esq., Trial Attorney for the United States Department of Justice, (R. 350-374) the testimony of Leon Strong, now deceased, Louis Simmons, defendants, and others, and shows that crew-member fishermen obtain a "lay" share of the catch in lieu of wages, contrary to the charges in the indictment that the dealers "(p)ay for such shrimp and oysters as buyers without regard to any subsequent division of the proceeds as among the boat owners, gear owners, or boat captains."

Through the office of subpoena *duces tecum*, served on Leon Strong, then the Secretary-Treasurer of petitioner Association, and now deceased, respondent obtained and introduced in evidence, the names of the officers of petitioner Association, their tenure of office, the names of the members of the Board of Directors of such Association for the year 1953, the Charter of Incorporation of the Association, the Minute Book, Cash Books and Ledgers, Price List(s), and the Constitution and By-laws of the Association.

Although it was sought to be shown by the respondent that the Association and the individual petitioners, as officers and directors of said Association, agreed upon, and fixed, the price to be paid for shrimp and oysters caught off the Coast of Mississippi, in the waters of the Gulf of Mexico and Mississippi Sound, the evidence shows, and proves, that such "price" as it was termed, was in truth and in fact, the fishermen's "lay" or share of the catch, in lieu of wages for their hire, at so much per day, per week, or per trip. (R. 493-583-796.)

Petitioner Association, a labor union, was incorporated under the Laws of the State of Mississippi, Section 6131, Mississippi Code of 1942, and such Association was chartered as a labor union by the Seafarers International Union of North America, (R. 608) "(f)or the purpose of affecting a thorough organization among all seamen and fishermen in North America for their own protection and welfare." The Mississippi Charter of Incorporation of petitioner Association (R. 45-46) shows the purpose for which it was created: "To work together for the improvement and betterment, of ourselves and our community; To have a legally constituted and authorized medium, by and through which we may better take up and discuss *with those for we work* the matter of securing better prices for our catches, *and better working conditions for ourselves and our co-workers.* And to obtain for us every reasonable and just advantage *in connection with our service*, and to create and foster a better understanding as *between all who work at the occupation of fishing and all those engaged in the buying and canning or shipping of such sea Foods as we might bring to them for sale.* And to do any and all things legally and lawfully necessary and proper to carry out the purpose of this Association. * * *." (Emphasis supplied.)

The Constitution and By-laws of petitioner Association, introduced in evidence by respondent, (R. 54, p. 1) recites: "The officers of this Corporation shall consist of a President, a Vice President, Secretary, and Treasurer, and Thirty-two Board of Directors. The purpose of this corporation shall be to foster and maintain friendly relations between its members *and those for whom they*

are to work and to obtain better working conditions and reasonable compensation for the members, thereof, from their employer, and to do any and all things necessary, legal and proper for the betterment and improvement of the members, *their employers,* and the communities in which they live, and to accomplish all the purposes set out and described in the charter of this Corporation, granted by the State of Mississippi. All of said purposes in the said charter, are herewith adopted in full, the same as though herein fully written. * * *." (Emphasis supplied.)

The members of petitioner Association were under the control of the factory "dealers"; the captains of the boats were hired, and could be fired, by such dealers. They bought groceries and provisions, fuel and oil, where they were directed, went out when they were directed, and otherwise were under the control of the factory-dealers. The boat captains were hired by the factory "dealers" and, in turn, hired their crews and fishermen crew-members. The members of petitioner Association, such fishermen crew-members, were paid a "lay" or share of the catch, at so much per barrel for shrimp and oysters, with the factory boat-owners, and dealers, getting an equal share of the catch. The members of petitioner Association brought in raw stock of shrimp and oysters to the factory "dealers", which were then processed and canned and sold by the factory "dealers" in interstate commerce. (R. 513-520-632-648-649.)

The compensation of the members of the petitioner Association for their "lay" or share of the catch of raw sea-

food, shrimp and oysters, was determined by comparing the compensation paid in other fishing ports, of Alabama, Texas and Louisiana, and elsewhere, and made competitive to permit the factory "dealers" for whom the petitioner Association dealt and its members worked, and by whom they, the members, were employed, to do business and to make a profit from the factory-dealer(s) operations. (R. 615-622-623-701.)

At the conclusion of the evidence, and after both sides had rested, (R. 832) the district judge, in the absence of the Jury, said:

"* * * I am of the opinion that the operation of the fishing boats is one of joint adventure. It is a matter for the Court to determine whether the relationship of master and servant exists, or joint adventure. If it was a relationship of master and servant or employer and employee, they would be entitled to a directed verdict. I fail to see any element of employer and employee in the case. The controlling elements in the case, I think, show definitely and conclusively that the transactions had between these parties, and as testified to by all the witnesses, is one of joint adventure. So in my general charge to the Jury it will be to the effect that the question is whether or not there was price fixing of products moving in interstate commerce. I just mention that in the absence of the Jury so that you gentlemen will know for your argument the thoughts that are running through my mind."

The district judge then refused the requested instructions of petitioners that would have permitted the Jury to determine as a question of fact, whether the members

of defendant Association were employees of the "dealers," and hence laborers, and the Association a labor union, exempt from the proscriptions of the Sherman Act. Such requests included the applicable provisions of the Clayton and Norris-LaGuardia Acts. (R. 863-865, 867, 869, 873, 876, 877, 878, 879, 880, 881, 882, 883, 884, 886(39), 887, 888.)

B. The Labor Union Group Issue. Petitioners contended below, and contend here, that they constitute a labor group—the Association is a labor union, and the members thereof laborers, within the meaning of Section 20 of the Clayton Act, and Sections 6 and 13 of the Norris-LaGuardia Act.

Although the district judge gave petitioners the requested instructions (R. 838-840) on the right(s) of labor unions to bargain collectively, and organize, he refused the requested instructions shown at R. 867, 869, 870, 871, 874, 875, 877, 878, 879, and 880, as to employer-employee relationship, the exemptions of laborers and labor unions from the proscriptions of the Sherman Act, and the limited liability of such labor group(s) under Section 20 of the Clayton Act, and Section 6 of the Norris-LaGuardia Act.

The court of appeals for the Fifth Circuit did not decide the question. Although the opinion might be considered as attempting to dispose of the question as to the sufficiency of the trial judge's instructions on the right of labor unions to organize and bargain collectively, and their exemptions from prosecution under the Sherman Act, provided they do not engage in a conspiracy to un-

lawfully and unreasonably restrain trade in interstate commerce, there is nothing in any of the instructions to even remotely suggest to the jury that labor organizations and labor groups are exempt from the proscriptions of the Sherman Act if they do not conspire and combine with non-labor groups who are themselves violating the Act. And, too, there is nothing in any of the court's instructions that might be construed as meeting the requirements of this Court's decision in the *United Brotherhood of Carpenters & Joiners of America* Case, Cal. 1947, 330 U. S. 395, 67 S. Ct. 775. The Court below ignored this argument, and did not attempt to apply the cited case(s).

The Labor Union Group Issue having been raised by petitioners, and the evidence introduced by respondent, in the form of the Association's Charter of Incorporation, Constitution, By-laws, etc., proving conclusively all of such contentions, it was error prejudicial to the rights of petitioners to have fair and impartial trial, according to the law and the evidence, first, in the trial court, and, next, in the court of appeals, for the lower court to approve the action of the trial judge in (a) refusing, and (b) in granting instructions for and against petitioners.

C. **The Employer-Employee Relationship Issue.** Petitioners contended below, in the trial court, and in the court of appeals, and now contend here, that the Association is a labor union and its members are laborers, and the evidence being susceptible of that conclusion, and that the shares or "lay" awarded the captain and crew were merely a method of paying them for their services, according to results accomplished, rather than on a daily

or weekly basis, the employer-employee relationship should have been submitted to the jury; such relationship was the matrix of the controversy. The purpose and intent of this labor group was a question of fact. The court of appeals disposed of petitioners' contentions by saying: "We think there was no reversible error in the court's oral charge, or in its refusal to give the instructions requested. While portions of the testimony might have justified a clearer submission of the factual issue of whether the captains and crew members operating the dealer-owner boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury, as a matter of law, that the substantial number of the Associations' member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers," deciding, definitely, for the purpose of this case, that an employee may not furnish his own tools, equipment, etc., and continue to remain an employee within the broad scope of the law of master and servant, employer and employee, contrary to the decided weight of authority, and so far as disregarded by the court below of settled principles of the jurisprudence of this country, as to call for the exercise by this Court of its supervisory powers to correct this manifest error.

D. The Decision of the Court of Appeals. In their appeal to the lower court petitioners posed the questions:

"(1) Whether a labor union and its officers and members may be indicted and charged with violation of the

Sherman Act by combining only with non-labor groups; whether the indictment charged an offense under the Sherman Act by simply alleging that the Defendant Association and its officers, co-defendants, combined and conspired to violate the Act with "others to the Grand Jurors unknown," without also, at least, charging that such others to the grand jurors unknown were non-labor groups whose object was to effect an illegal restraint of trade or commerce, and, as part of a concerted plan or effort, agreed or undertook to be directly intended to assist such non-labor group in accomplishing its illegal purpose, and that by charging the Defendant Association was a Mississippi Corporation, whether the objects and purpose clause, shown to be that of a labor union, such indictment charged a crime against the Sherman Act, without particularly negativing the provisions of the Clayton and Norris-LaGuardia Acts.

(2) Whether, where evidence for and against (appellants) shows that fishermen crew-members receive a "lay" share of the catch of shrimp and oysters in lieu of wages, at certain price per barrel, is a jury question posed that such fishermen are seamen-employees, entitled to a lien for wages, rights under the Jones Act, and exempt from the proscriptions of the Sherman Anti-Trust Act.

(3) Whether, where in a prosecution of an incorporated Association and its members, Officers, for violation of the Sherman Act, the evidence shows that fishermen crew-members worked on "lay" shares of the catch of shrimp and oysters, in lieu of wages, at so much per barrel, and

the trial court gives requested instructions on the right of labor to organize, form unions, and bargain with employers, it is also incumbent on the Court to give further instructions on the limited liability of labor union and members and officers, under the Clayton and Norris-LaGuardia Acts.

(4) Whether, where the evidence is susceptible of the conclusion that the relationship of employer and employee existed between the fishermen crew-members of defendant Association, and that they were employed on a "lay" share of the catch of shrimp and oysters, in lieu of wages at so much per day or week, it was error for the trial judge to rule, as a matter of law, that no relationship of employer-employee and master and servant existed, and hold that such relationship was that of joint adventure.

(5) Whether, where the proof is susceptible of the conclusion that fishermen crew-members of defendant Association were employees of the "dealers", mentioned in the indictment, and received a "lay" share of their catch, in lieu of wages at so much per day or week, is a question of fact posed for decision by a jury, rather than a question of law for the court.

(6) Whether, where the evidence involves labor union activities, and the activities of members of such labor union, such activities constitute a violation of Chapter 1, Title 15, U. S. C. A., commonly called the Sherman Act, may be determined without applying, as a harmonizing text, Sections 20 of the Clayton Act, and 6 of the Norris-LaGuardia Act, removing all such allowable conduct from

the taint of being "violations of any law of the United States," including the Sherman Law.

Respondent contended below that regardless of the charter provisions of the defendant Association, that it was a labor union, and its members laborers, or workers, and the contents of the Constitution and By-laws of such corporation, the charges in the indictment must control; and argued that such indictment need not charge a combination and conspiracy with non-labor groups. In the brief of respondent, before the court of appeals, Counsel for the Government contended the trial judge's instructions relating to the Clayton and Norris-LaGuardia Acts were sufficient, and claimed that, contrary to petitioners' assertion, the trial judge submitted the question of their legal status to the jury, but said that no instructions whatever relating to the Clayton and Norris-LaGuardia Acts were warranted, because (1) no "labor dispute" within the meaning of the Norris-LaGuardia Act was involved, and (2) that any labor exemption for "appellants is precluded by the Association's combination with certain packers in fixing prices," quoting from their brief.

The Court below affirmed the District Court on all of the issues (C. A. Op., *infra*, pp. 27-42; C. A. Judgment, *infra*, p. 42), except the opinion says that "(w)hile portions of the testimony might have justified a clearer submission of the factual issue of whether the captains and crew members operating the dealer-owned boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have

instructed the jury, as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers," and "(m)oreover, since a labor organization's exemption from liability under the Sherman Act is restricted to activity occurring in a 'labor dispute', and it is highly debatable whether such a 'labor dispute' within the meaning of Section 13 of the Norris-LaGuardia Act here existed, and instructions given were at least as favorable, if not more favorable, than those to which appellants were entitled."

REASONS FOR GRANTING THE WRIT.

By holding that "each of these contentions (of petitioners) as to the insufficiency of the indictment is unsound," (C. A. Op., *infra* p. 33) the court below has decided that a labor union and a labor group may violate the Sherman Act by conspiring with other labor groups, and with unnamed non-labor groups—"others to the Grand Jurors unknown," not alleged to be violating, or to have violated, the Act. This result runs counter to numerous decisions of this Court and is in consequence in conflict with rulings in other circuits.

That "if a labor union and its members act wholly by themselves or in conjunction with other labor groups, in the sphere and by the methods recognized in the Clayton and Norris-LaGuardia Acts, to carry out the legitimate objects of such an organization, in improving or preserving the economic position of labor in industry and its

employment relationships and conditions," they are not subject to prosecution under the Sherman Act merely because their acts may incidentally serve to affect and restrain trade or commerce," we had supposed was settled by *Truck Drivers' Local No. 421, Etc. v. United States*, 8th Cir., 128 F. 2d 227, 232, 233, and the decisions of this Court, in *United States v. Hutcheson*, 312 U. S. 219, 61 S.Ct. 463, 466, and the decisions which followed it, including *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U. S. 797, 65 S.Ct. 1533. As Mr. Justice Black said in the *Allen Bradley* Case, *supra*, "(u)nder our holdings in the *Hutcheson* case which followed it, had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act. * * * Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. * * *."

I. A. The opinion that an Association's corporate charter, "while relevant to show the 'objects and purposes' for which it was formed," (C. A. Op., *infra*, p. 34) (it) "cannot exonerate it from liability for proven violations of a Federal statute, whether the complained of activity of the Association and its agents was ultra vires or not," overlooks the premise that the sufficiency of indictments must be determined without reference to the proof, and was, the writer believed, settled by Federal Criminal Procedure Rule 34, and *Sutton v. U. S.*, CA-5, 1946, 157

F.2d 661 and cases cited. See, also, *U. S. v. Bradford*, CA-2, 1952, 194 F.2d 197, cert. den. 343 US 979.

We cannot conceive this Court holding that Federal Criminal Procedure Rule 7(c) "elevates form above substance," as stated in the opinion of the lower court, to the extent that proof may be looked to in deciding the sufficiency of an indictment under the Sherman Law, in the face of the searching inquiry posed by a motion to dismiss, and by motion *in arrest of judgment*. (R. 910.) Federal Criminal Procedure Rule 34. Here, unlike *United States v. American Tobacco Co.*, 211 U. S. 106, 180, 181, and *Local 36 v. United States*, 9th Cir., 177 F.2d 320, 336, Note 25, cited in the opinion of the court of appeal, the indictment returned against petitioners is absolutely devoid of the necessary allegations to supply "the essential facts of the matter," required by Rule 7(c) of the Federal Rules of Criminal Procedure. Surely deficiences in an indictment may not be cured by proof showing that labor unions and their members have combined with non-labor groups "to effect an unlawful restraint upon trade and commerce," as held by the court of appeals, and the opinion so stating is contrary to the decisions of this Court and other circuits, especially *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 798, 810; *United States v. Hutcheson*, 312 U. S. 219, 232, 61 S. Ct. 463, 466, 85 L.Ed. 788, and *Truck Drivers Local No. 421, Etc. v. United States*, 128 F.2d 227, 232, 233, from the 9th Cir. As said by Mr. Justice Frankfurter, in *United States v. Hutcheson, supra*, "Whether labor union activities constitute a violation of the Sherman Act, is to be determined only by reading, and applying, as a harmonizing text, Section 20 of the Clayton

Act and Section 6 of the Norris-LaGuardia Act, removing all such allowable conduct from the taint of being 'Violations of any Law of the United States,' including the Sherman Law."

B. The ruling below does not square with the decision of this Court in *United States v. Hutcheson, supra*, 312 U. S. 219, 232, 61 S. Ct. 463, 466, and the sufficiency of the indictment in the case at Bar definitely does not turn "exclusively on analysis of (such) indictment and the statute on which it is based," as contended by respondent in the Court below, because, in the first place, matter de hors the indictment must be considered, where, as here, there is the charge that the defendant Association is a Mississippi corporation, and the individual defendants are officers of such Association; (*Vanderbilt v. Commissioner of Int. Revenue*, 93 F.2d 360) holding that the object for which a corporation is organized is to be determined from what is stated in its certificate of incorporation and its constitution and by-laws, and, next, because this Court said, in *United States v. Hutcheson, supra*, "Whether labor union activities constitute a violation of the Sherman Act, is to be determined only by reading, and applying, as a harmonizing text, Section 20 of the Clayton Act and Section 6 of the Norris-LaGuardia Act, removing all such allowable conduct from the taint of being 'Violations of any Law of the United States,' including the Sherman Law."

The court below stated (C. A. Op., *infra*, p. 35.) "Where as here, an exemption from liability is not set forth in the statute defining the offense, it is not essential for the

indictment to negative the possibility of the existence of such exemption," citing *McKelvy v. United States*, 260 U. S. 353, 357, and held "That is strictly a matter of proof." We did not argue then, and do not suggest now, that the possibility of the existence of such exemption, as the lower court puts it, must be negatived by the indictment. We do argue and state, as this Court said in the *Hutcheson* Case, *supra*, that whether labor union activities of respondents constitute a violation of the Sherman Act, must be determined only by reading, and applying, "as a harmonizing text," Section 20 of the Clayton Act and Section 6 of the Norris-LaGuardia Act, which removes all such allowable conduct from the taint of being "Violations of any Law of the United States," including the Sherman Law.

The judgment of the lower court is contrary to decided cases of this Court, and in conflict with rulings in other circuits. The gravamen of the offense of violation of the Sherman Act by labor unions and labor groups is that such labor unions and groups combined with non-labor groups, and indictments attempting to charge violations of such Act must so allege, as a fact, that respondents combined with non-labor groups who were themselves violating the Act.

II. The court below said that "We think there was no reversible error in the court's oral charge, or in its refusal to give the instructions requested. While portions of the testimony might have justified a clearer submission of the factual issue of whether the captains and crew members operating the dealer-owned boats were employees of

those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury, as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers. Moreover, since a labor organization's exemption from liability under the Sherman Act is restricted to activity occurring in a 'labor dispute', and it is highly debatable whether such a 'labor dispute' within the meaning of Section 13 of the Norris-LaGuardia Act here existed, the instructions given were at least as favorable, if not more favorable, than those to which appellants were entitled." (C. A. Op., *infra*, p. 37.)

We think it too plain for words that this approach ignores the very distinctions which this Court has held controlling in many cases. For example, in *United Brotherhood of Carpenters & Joiners of America v. United States*, Cal. 1947, 330 U. S. 395, 67 S.Ct. 775, 91 L.Ed. 973, this Court said: "* * * We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under § 6. The error is aggravated by the failure to give the correct charge upon request. * * *."

The instruction quoted by the lower court (CA Op., *infra*, p. 36) is insufficient, standing alone, to pose the true question-whether the Association's members were employees of the "dealers" mentioned in the indictment. Such was a question of fact for the decision of the jury,

not the trial judge. The instructions requested by petitioners, concerning the status of the Association's members, whether employees of the dealers, and their rights as laborers, (R. 863, 864-888) should have been granted by the trial judge, and such refusal constitutes prejudicial and therefore reversible error. Whether the evidence for and against petitioners was susceptible of the conclusion that the Association's members were employees of the "dealers" mentioned in the indictment, and the shares or lay awarded the captain and crew were merely a method of paying them for their services according to results accomplished, rather than on a daily or weekly basis, posed a question for the jury. The judgment of the lower court is contrary to *Southern Shell Fish Co., Inc. et al. v. Plaisance*, CA-5th, 196 F.2d 312, 314, and *Osland v. Star Fish & Oyster Co.*, CA-5th, 197 F.2d 113, 114; *Noland v. General Sea Foods Corp.*, CA-1, 112 F.2d 515, and *Loe v. Goldstein*, CA-9, 101 F.2d 967, and in conflict with the decision of this Court in *Gianfalo v. Texas Co.*, 76 S.Ct. 141. In the *Gianfalo v. Texas Co.* Case, *supra*, this Court reversed the Fifth Circuit, 202 F.2d 382, and held that no matter how conclusive the evidence, as to the relationship of employer and employee, the question must be submitted to the jury under proper instructions from the trial judge.

Although evidence to the effect that fishermen crewmembers were paid no daily wages, but given a percentage of the proceeds from the sale of the fish caught, *Osland v. Star Fish & Oyster Co.*, CA-5, 107 F.2d 113, 114; *Southern Shell Fish Co.*, CA-5, 196 F.2d 312, 314; *Nolan v. General Sea Foods Corp.*, CA-1, and *Loe v. Goldstein*,

CA-9, 101 F.2d 967, was held to sustain the position that such crew-members were employees, entitled to lien for wages and rights under the Jones Act, here, in the case against petitioners, the same evidence becomes a road to prison, paraphrasing *United States v. Hutcheson*, 312 U. S. 219, 232, 61 S.Ct. 463, 466, where this Court said: "* * * To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. * * *."

By holding that "(w)hile portions of the testimony might have justified a clearer submission of the factual issue of whether the captains and crew members operating the dealer-owned boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury, as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers," (CA Op., *infra*, pp. 37-38) the court below has decided that laborers who own and furnish their own tools, equipment, etc., and hire out to employers at so much per barrel of shrimp and oysters, or at so much per completed job, otherwise termed piece-work, rather than on a daily or weekly wage, arrived at by bargaining

with such employer, either alone or in concert with others, by and through labor unions, lose their status as employees; and that no question is, or may ever be, posed for determination by a jury. It occasions no surprise that such self-contradictory result runs counter to numerous decisions of this Court and decisions of other circuits. The lower court so far departs from the accepted course of judicial procedure as to call for an exercise of this Court's supervisory powers.

During the argument before the lower court the writer was asked several times by at least one member of the court if the district judge ever corrected the error(s) in his instructions to the jury. Although the court's questions were answered in the negative, and illustrate factually from the record, the opinion of such court now finds no error and would affirm the judgment(s) of conviction, despite the decided weight of authority to the contrary.

CONCLUSION.

Since the decisions of this Court in the *United States v. Hutcheson* Case, *supra*, and *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electric Workers, et al.* Case, 325 U. S. 797, 65 S. Ct. 1533, the bench and bar of the United States have felt secure in the position that where there is no union-contractor-manufacturer combination, union activities and actions within the exemptions of the Clayton and Norris-La-Guardia Acts, are not violations of "any law of the

United States," including the Sherman Act. The court of appeals for the Fifth Circuit would now unsettle the law, and start the wheel anew.

The rulings below inject uncertainty and inconsistencies into the labor relations law. No matter how strong the evidence showing employer-employee relationship as the matrix of the controversy, the decision of the lower court would permit the trial judge to determine and decide the matter as a question of law, and deprives petitioners of their constitutional right to have the question of fact decided by the jury.

The statutes involved in this cause, as construed and applied against the petitioners, violate the Fifth and Sixth Amendments to the Constitution of the United States; their attack on the sufficiency of the indictment returned against them is disposed of by assertions in the lower court's opinion that any deficiencies in said indictment may be supplied by the proof on the trial before the jury.

To secure uniformity in the decisions of the circuit courts, and to cause the lower court to adhere to the rulings and decisions of this Court, this petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners,
3-5 Schwan Building,
Biloxi, Mississippi.

HOWARD A. McDONNELL, Esq.,
Barq Building,
Biloxi, Mississippi,

C. PAUL BARKER, Esq.,
Carondelet Building,
New Orleans, Louisiana,
Of Counsel.

CERTIFICATE.

I hereby certify that copies of this brief have been served on opposing counsel this day of October, 1956.

.....

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15680

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS, LEON STRONG and WALTER McVEAY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 6, 1956.)

Before RIVES, CAMERON and BROWN, Circuit Judges.

RIVES, Circuit Judge: This appeal is from judgments of conviction entered upon jury verdicts finding appellants guilty of engaging in a combination or conspiracy in restraint of trade or commerce in violation of the Sherman Antitrust Act.[1] The errors specified and argued

[1] 15 U.S.C.A. I provides in part:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * * * * . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of amisdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

relate mainly to the sufficiency of the indictment, the adequacy of the court's oral charge, the refusal of the court to give certain written instructions requested by the appellants, and the overall sufficiency of the proof to support the verdict.

The appellant Association is a corporation organized under the laws of Mississippi, with headquarters at Biloxi and affiliated branches at Pascagoula, Bay St. Louis, Gulfport and Pass Christian. During the 1950-1953 period here material, appellant Simmons was President of the Association, and appellant McVeay was Secretary of the Pascagoula branch.[2]

The evidence shows that practically all commercial shrimp and oyster fishermen operating from the aforementioned Mississippi ports were members of the appellant Association. Upon stipulated conditions, Association membership was extended to both fishing boat captains and crew members.[3] Association members were permitted to sell their catches to about twenty-two shrimp and oyster packers and canners at various locations along the Mississippi coast, and practically all of the shrimp and oysters packed by these companies were shipped in interstate commerce. All packers and canners were required by Association rules to purchase every catch

---

[2] Two other officers of the Association, Fred Costello and Leon Strong, were also included as defendants in the indictment, but the district court discharged Costello for insufficiency of the evidence to implicate him in the alleged conspiracy, and though the defendant Strong was convicted, he died during the pendency of his appeal.

[3] The jury was authorized to find that the Association limits membership to residents of the Gulf States area for a period of two years or more.

tendered by Association fishermen, to furnish free ice for the fishermen to prevent spoilage, and to pack both shrimp and oysters.

The majority of the smaller boats used were owned by individual fishermen-members of the Association, but most of the larger boats were owned by the packers or "dealers". An Association rule purported to require the dealers to purchase fishing licenses for all boats, whether owned by them or by the fishermen, though the proof shows that a number of fishermen-members of the Association owning their own boats purchased their own licenses.[4] The boats used by the fishermen-members fall into three separate classifications: (1) those both owned and licensed by the dealers; (2) those boats owned by the fishermen, but licensed by the dealers; and (3) those boats both owned and licensed by the individual fishermen. Fishermen who operated boats in the first classification were generally required to sell their catches to the dealer who owned the boat, except in emergency instances when it became necessary during a voyage to sell and deliver the catch to some other dealer's "freight boat" to prevent spoilage. Fishermen who operated boats in the second classification generally sold their catches to the dealer who purchased their boat license, but there was no compelling obligation for them to do so if other dealers were offering a higher price. Of course, fishermen who operated boats which were both individually owned and licensed could dispose of their catches to whatever dealer they desired.

[4] About 100 of the 445 licenses issued by the Mississippi Seafood Commission for the operation of shrimp and oyster boats during 1952 were granted to individual Association members.

The captains of the boats were selected by the dealers, and the captains generally had the right to select and hire or fire their crew members. The boat captains were in actual charge of the fishing operations after the vessels left port, and the dealers had no right to direct them as to when and where to fish, though the dealers could specify the type fish to be caught, usually shrimp, and the locations to which the catches should be returned. There is some defensive testimony that the dealers, through their failure either to permit use of their boats; or, in some instances, to agree to purchase the catch of boats owned and operated individually by the fishermen, could at any time effectively terminate the services of any particular captain and his crew members with whose work they were dissatisfied.

The proceeds of each catch were ordinarily divided between the fishermen and dealers according to the "Mississippi system of sharing", which system required that the fuel and grocery expenses for each trip first be deducted from the value of the entire catch, after which equal shares were received by the boat owner, the boat captain, and each member of the crew. In those instances where the boat's "rig"[5] was not paid for, an additional and equal share was also first allocated to discharge this indebtedness. If the catch was small and its value did not exceed the expenses incurred, the fishermen received nothing and were still responsible for repayment of any expenses advanced, though further testimony shows that certain dealers would "carry over" these unpaid expenses

[5] The rig would include the boat nets, tackle and other gear required either to trawl for shrimp or dredge for oysters.

until other trips were made where the catches were sufficient to cover the expenses already accrued from a prior, unsuccessful trip. As to dealer owned or licensed boats, some of the dealers admitted their payment of state severance taxes levied upon shrimp and oysters caught under this arrangement; that they further withheld and paid income tax of fishermen, based upon the fishermen's share of each catch, and deducted social security taxes and unemployment insurance contributions from the value of the fishermen's share for transmittal to the federal and state taxing authorities.

The proof adduced by the Government in support of its indictment allegations that appellants had conspired to fix and maintain prices shows that, whatever the type boat used, all Association fishermen were prohibited from selling shrimp or oysters below the prices set by the Association; that member-captains operating dealer-owned "freight boats" were also prohibited from buying at below Association prices; that neither the fishermen-members nor the dealers were permitted to buy shrimp or oysters from any fisherman who was not a member in good standing with the Association; and that any member who sold his catch below Association prices was subject to a fine, suspension from membership, and forfeiture of the proceeds from the sale of his catch. Other Government proof shows that, to insure dealer compliance with its pricing policies, the appellant Association either authorized or ratified mass member picketing, designed to prevent nonmember or out-of-state fishermen from fishing in Mississippi waters or selling to Mississippi coast packers; boycotting of nonconforming dealers by Association

members; and coercion of nonmember fishermen to join the Association and comply with its price schedules.[6]

The Association President, appellant Simmons, in his statement prepared for grand jury presentation, captioned "The Way the Prices Are Fixed", reported that up until 1952 the membership of the Association met as a body to discuss prices; that after a price was fixed the Association officers were instructed to notify the dealers that such price would be demanded; that, subsequently, the Association adopted a faster and less cumbersome method of determining prices through an Association "price control committee", consisting of nine member-fishermen authorized to raise or lower the price according to the season and the way the catch was running; and that the dealers did not participate in the discussions and deliberations of the price control committee. A seriously contested issue at the trial was whether raw shrimp and oyster prices were arbitrarily fixed by this "price control committee" without the consent of the dealer-packers, or whether they were arrived at through mutual bargaining and negotiation between the Association and its members on the one hand, and the dealer-packers on the other. Though appellant Simmons at the trial re-affirmed his prior grand jury statement that the dealers did not participate in the determinations of the "price control committee", his overall testimony along with other defensive

[6] An instance of violence and forceful intimidation of nonconforming dealers and nonmember fishermen occurred during the Pascagoula disturbance in July, 1951, when several hundred fishermen-members of the Association participated in picketing of the Pascagoula docks and in forceful prevention of an attempt by out-of-state fishermen to sell their shrimp catches to local packers.

proof tends to show that a number of dealers did, upon invitation, attend committee meetings to contest the prices there agreed upon and demanded of them by the committee, especially when an increase in the prices of raw shrimp and oysters was sought; and in a number of instances actually initiated meetings of the price control committee to obtain a price reduction when prevailing local prices were higher than those paid by packers elsewhere with whom the dealers felt they could not successfully compete. However, a number of packers testified for the Government that they either were not invited to attend the meetings, or that at such meetings they had no effective means of blocking the price determinations of the committee, their only alternative being either to pay the prices fixed by it or suspend their packing operations.

I. **Sufficiency of the Indictment.**

Appellants first insist that certain allegations of the indictment render it fatally insufficient to charge any offense under the Sherman Act.[7] They argue that the indictment allegation of the Association's incorporation under Mississippi law by necessary reference restricts the objects and purposes of the Association to those of a "labor group", as supposedly revealed by its corporate

[7] Particularly under attack are the allegations of the Association's incorporation under Mississippi law: the averment that the Association membership is composed of "independent businessmen engaged in business on their own account"; that "no employer-employee relationship exists between the fishermen and the dealers to whom the catch is sold"; and that defendants joined with "other persons to the Grand Jurors unknown" in carrying out the conspiracy alleged.

charter;[8] that Section 20 of the Clayton Act and Section 6 of the Norris-La Guardia Act insulate such labor organization activity from Sherman Act liability;[9] and that the indictment is further defective in charging a conspiracy with "other persons * * unknown", instead of specifically alleging that such other parties were non-labor groups, which allegation appellants urge is essential to state an offense against them under the Sherman Act. For reasons hereinafter stated, we think each of these contentions as to the insufficiency of the indictment is unsound.

First, the Association's corporate charter, while relevant to show the "objects and purposes" for which it was formed, cannot exonerate it from liability for proven violations of a Federal statute, whether the complained of activity of the Association and its agents was ultra vires or not. Unless we are to elevate form above substance, the controlling consideration is whether the proof reveals the activity complained of as violative of the Act, not whether a particular group's asserted privileged status forbids its prosecution. See *United States v.*

---

[8] The "objects and purposes" clause of the Association's charter provides:

"The purpose for which it (Association) is created: To work together for the improvement and betterment of ourselves and our community; To have a legally constituted and authorized medium, by and through which we may better take up and discuss with those for whom we work the matter of securing better prices for our catches and better working conditions for ourselves and our co-workers. And to obtain for us every reasonable and just advantage in connection with our service, and to create and foster a better understanding as between all who work at the occupation of fishing and all those engaged in the buying and canning or shipping of such seafoods as we might bring to them for sale."

[9] See United States v. Hutcheson, 312 U.S. 219, 231-234; 15 U.S.C.A. 17; 29 U.S.C.A. 52.

American Tobacco Co., 221 U.S. 106, 180, 181; *Local 136 v. United States*, 9th Cir., 177 F. 2d. 320, 336, Note 25. In any event, a labor group is not immune from Sherman Act liability if the proof, as distinguished from the indictment allegations, shows that it has combined with non-labor groups to effect an unlawful restraint upon trade and commerce. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 798, 810. Thus, if we assume appellants' asserted status as a labor organization, in spite of the indictment allegation that its membership is composed of "independent businessmen", the indictment here was not fatally defective in failing expressly to negative the possibility of the testimony revealing that those other unknown persons with whom appellants allegedly conspired were non-labor groups. Where, as here, an exemption from liability is not set forth in the statute defining the offense, it is not essential for the indictment to negative the possibility of the existence of such exemption. See *McKelvey v. United States*, 260 U.S. 353, 357. That is strictly a matter of proof.

II. **The Court's Charge.**

Appellants' main attack upon the court's oral charge is its failure to present clearly for jury determination the determinative factual issue of whether the fishermen-members of the Association were joint adventurers or employees of the dealers.[10]

[10] On this issue the district court concluded in the jury's absence as follows:

"I am of the opinion that the operation of the fishing boats is one of joint adventure. It is a matter for the Court to determine whether the relationship of master and servant exists, or joint adventure. If it was a relationship

At appellants' request, the court instructed the jury as follows:

> "The Court instructs the Jury for the Defendants that labor unions have the legal right to bargain collectively and are exempt from the provisions of the Sherman Anti-Trust Act, provided that they do not engage in a conspiracy to unlawfully and unreasonably restrain trade. Therefore, if you find from the evidence, or lack of evidence, that the Defendants are a labor union, consisting of laborers and employees and that their negotiations with the dealers did not consist of price-fixing, as alleged in the indictment, then it is your sworn duty to return a verdict of NOT GUILTY."

Appellants insist, however, that the instruction given was incomplete and insufficient to inform the jury of the substance of their main defense; i.e., that, if the fishermen were found to be employees of the dealers, appellants were not guilty as a matter of law. They accordingly urge reversible error for the court's failure to present the issue more succinctly, as set forth in several of their other requested charges which the court refused.[11]

---

of master and servant or employer and employee, they would be entitled to a directed verdict. I fail to see any element of employer and employee in the case. The controlling elements in the case, I think, show definitely and conclusively that the transactions had between these parties, and as testified to by all the witnesses, is one of joint adventure."

[11] For example, appellants' instruction No. 24, refused by the court, reads as follows:

"It is one of the contentions of the Defendants in this case that in essence they are workers, or laborers, selling their services and the use of their vessels and equipment, as fishermen, at wages to be determined at so many cents per pound for shrimp and oysters.

"If you should find as a fact that they are such type of workers, being compensated as mentioned, then I instruct

We think there was no reversible error in the court's oral charge, or in its refusal to give the instructions requested. While portions of the testimony might have justified a clearer submission of the factual issue of whether the captains and crew members operating the dealer-owned boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury, as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers.[12] Moreover, since a labor organization's ex-

---

you that no law of the United States prevents them from agreeing among themselves to set a price on shrimp and oysters, and you must therefore find them 'NOT GUILTY'."

[12] It is not entirely clear from the record what number or percentage of dealers who withheld income and social security taxes of the fishermen were dealers owning their own boats, and what percentage withheld from fishermen operating individually owned and licensed boats. A report of the Gulfport, Mississippi, Social Security Administration Office, revealing a determination that the services of one Oscar T. Chinn, a fishing boat captain for the Biloxi Canning & Packing Co., constituted "employment" within the meaning of Sec. 210 of the Social Security Act, is, therefore, not controlling here, since that report reveals that Chinn was operating a large, company-owned vessel, and does not preclude a finding from this record that the fishermen who owned and operated their own boats were not employees of their dealers. In any event, no principle of res judicata or estoppel operates to bar the Government from maintaining this Sherman Act prosecution merely because one of its welfare agencies makes a determination from undisclosed testimony seemingly contra to the Government's instant claim that a controlling percentage of these fishermen were not employees, but were "independent businessmen" or joint venturers with the dealers for whom they operated. The public may not be deprived of the protection of a statute because of the action or inaction of officials of a government administrative agency. See Pennsylvania Water & Power Co. v. Federal Power Commission, C.A.D.C., 123 F. 2d. 155, 162; N.L.R.B. v. Baltimore Transit Co., 140 F. 2d. 51, 54-55; McComb v. Homeworkers' Handicraft Cooperative, 4th Cir., 176 F. 2d. 633, 641.

emption from liability under the Sherman Act is restricted to activity occurring in a "labor dispute", and it is highly debatable whether such a "labor dispute" within the meaning of Section 13 of the Norris-La Guardia Act here existed,[13] the instructions given were at least as favorable, if not more favorable, than those to which appellants were entitled.

Appellants further insist, though not too confidently, that the district court erred in refusing to submit to the jury the question of whether the actual activities of the Association and its members were within legal objectives permitted by Sec. 1 of the Fisheries Collective Marketing Act, 15 U.S.C.A. 521.[14] The Association did not act as a

[13] See Columbia River Packers Association, Inc. v. Hinton, et al., 315 U.S. 143, 146-147; Local 36 of International Fishermen v. United States, 9th Cir., 177 F. 2d. 320, 330; certiorari denied 339 U.S. 947; Hawaiian Tuna Packers v. International Longshoremen's & Warehousemen's Union, 72 F.Supp. 562, 566.

[14] "§521. *Fishing industry; associations authorized; aquatic products defined; marketing agencies; requirements*

"Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

"The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

"Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

marketing agency for its members, except in the fixing of the prices to be paid for shrimp and oysters. The members sold their catches directly to the dealers. In its price-fixing, the Association exceeded any possible privilege or exemption granted by the Fisheries Collective Marketing Act when it undertook not simply to fix the prices demanded by its members, but to exclude from the market all persons not buying and selling in accordance with its fixed prices. *Local 36 v. United States*, 9th Cir., 177 F. 2d. 320, 332; *Manaka v. Monterey Sardine Industries, Inc.*, N.D. Cal., 41 F.Supp. 531; Cf. *United States v. Borden Co.*, 308 U.S. 188.

III. **Sufficiency of the Evidence to Show Appellants' Price Fixing and Illegal Restraint.**

Much of the testimony has already been summarized relative to appellants' price-fixing rules and policies, and the coercive methods and practices by means of which these policies were implemented through fines against nonconforming Association members, dealer boycotts, picketing, forceful prevention of nonmember and out-of-state fishermen from operating from Mississippi ports or selling to Mississippi packers, and coercion of them to join the Association in order to force compliance with its price schedules. While our emphasis and reliance upon

---

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"and in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

this testimony is intended merely as illustrative, rather than exhaustive of the voluminous record testimony supporting the verdict, we think that such testimony, coupled with several significant admissions contained in appellant Simmons' grand jury statement [15] and testimony of the deceased appellant Strong,[16] was sufficient to present a jury question as to whether appellants engaged in that form of unlawful price-fixing and restraint of interstate trade prescribed by the Sherman Act. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493; *Allen Bradley Co. v. Local No. 3*, 325 U.S. 797, 798, 810; *Local No. 36 v. United States*, 9th Cir., 177 F. 2d 320, 330, cert. den. 339 U.S. 947; *Hawaiian Tuna Packers v. International Longshoremen's and Warehousemen's Union* (D.C. Hawaii) 72 F. Supp. 562, 567.

---

[15] For example, Simmons' admission that, "The dealers do not participate in any way in the discussion and deliberations of this (price control) committee," and his further admission that, "We do try to prevent boats manned by fishermen who are not members of our union from coming into our dealers and dumping their catch on our dealers, underselling our men and running our fishermen off."

[16] With reference to the Pascagoula disturbance in July, 1951, at which picketing by several hundred Association members and some violence occurred, Strong conceded in his testimony that, "The members did it and I guess we were responsible for it, sure." Other testimony shows that the Association paid for food for the members who engaged in the picketing and even took some disciplinary action against those who were supposed to participate and did not. The Association also paid for appellant Simmons' transportation from Biloxi, Mississippi to Pascagoula on the morning of the disturbance.

The judgment is accordingly.

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.,
Clerk.

(Seal) By CLARA R. JAMES,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX B.

JUDGMENT.

Extract from the Minutes of September 6th, 1956.

No. 15680.

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS, LEON STRONG and WALTER McVEAY,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX C, STATUTES INVOLVED.

1. Section 1 of the Sherman Act, as amended, insofar as material provides: (15 U. S. C. § 1, 26 Stat. 209)

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; . . . . . ."

2. Section 6 of the Clayton Act (15 U. S. C. § 17, 38 Stat. 731):

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731."

3. Section 20 of the Clayton Act (29 U. S. C. 52, 38 Stat. 738):

> "That no restraining order or injunction shall be granted by any court of the United States or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking

employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney; And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" (Emphasis supplied.)

4. Section 1 of the Norris LaGuardia Act (29 U. S. C. A. § 101):

> "No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections. Mar. 23, 1932, c. 90, § 1, 47 Stat. 70."

5. Section 13(c) of the Norris LaGuardia Act (Mar. 23, 1932, 47 Stat. 73, 29 U. S. C. A. 113(c)):

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

6. Section 6131, Mississippi Code of 1942, Labor Organizations, etc.:

> "Labor Organizations, etc.—Nothing contained in this Act shall be construed to apply to any labor organization, trade union, or fishermen's union, organized to promote the welfare of its members or to deprive any existing labor organization, trade union or fishermen's union of any rights vested in it prior to the passage of this Act: the right of which

organizations and unions to fix scales of wages for their members and prices to be charged by their members for raw seafoods being hereby recognized and approved; nor shall this Act be construed to limit the right of such labor organizations to bargain wage scales and prices for raw seafoods."

7. U. S. Constitution, 5th Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment * * * * * *nor be deprived of life, liberty or property without due process of law.* * * *." (Emphasis supplied.)

8. U. S. Constitution, 6th Amendment:

"In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury in the state and district wherein the crime shall have been committed * * * * * *and to be informed of the nature and cause of the accusation.* * *." (Emphasis supplied.)

Rule 7(c), Federal Rules of Criminal Procedure provides:

"Nature and Contents. The indictment or the information *shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.* * * * *." (Emphasis supplied.)

Rule 34, Federal Rules of Criminal Procedure, provides:

> "The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Allen-Bradley Co. v. *Local No. 3*, 325 U. S. 797	6, 9
Columbia River Packers Ass'n, Inc. v. *Hinton*, 315 U. S. 143	
Edwards v. *United States*, 312 U. S. 473	7
Hawaiian Tuna Packers v. *International Longshoremen's and Warehousemen's Union*, 72 F. Supp. 562	9
Local 36, International Fishermen and Allied Workers of America v. *United States*, 177 F. 2d, certiorari denied, 339 U. S. 947	6, 9
Manaka v. *Monterey Sardine Industries*, 41 F. Supp. 531	10
McHugh v. *United States*, 230 F. 2d 252, certiorari denied, 351 U. S. 966	9
McKelvey v. *United States*, 260 U. S. 353	7
United States v. *American Tobacco Co.*, 221 U. S. 106	7
United States v. *Cook*, 17 Wall. 168	6, 7
United States v. *Empire Hat & Cap Mfg. Co.*, 47 F. Supp. 395	6
United States v. *Hutcheson*, 312 U. S. 219	6, 7, 9

407082—56

Statutes:
Clayton Act, 29 U. S. C. 52: Page
Sec. 20 11
Norris-LaGuardia Act, 29 U. S. C. 104:
Sec. 4 (a) 12
Sec. 4 (b) 12
Sec. 4 (c) 12
Sec. 4 (d) 13
Sec. 4 (e) 13
Sec. 4 (f) 13
Sec. 4 (g) 13
Sec. 4 (h) 13
Sec. 4 (i) 13
Sec. 13 (c) 9, 13
Sherman Act, 15 U. S. C. 1:
Sec. 1 11
Miscellaneous:
F. R. C. P., Rule 7 (c) 7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 480

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS, AND WALTER MCVEAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 27–41) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1956 (Pet. 42). The petition for a writ of certiorari was filed on October 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment properly charged a violation of the Sherman Act.

2. Whether the District Court's instructions to the jury were insufficient with respect to petitioners' claimed antitrust exemption under the Clayton and the Norris-LaGuardia Acts.

STATUTES INVOLVED

Section 1 of the Sherman Act, Section 20 of the Clayton Act, and Sections 4 and 13 (c) of the Norris-LaGuardia Act are set forth in the Appendix, *infra*, pages 11–13.

STATEMENT

On April 1, 1953, an indictment was returned in the United States District Court for the Southern District of Mississippi charging petitioners (an association of shrimp and oyster fishermen, and two of its officials [1]) with violating Section 1 of the Sherman Act (R. 2–11). The indictment charged that the defendants, together with other persons unknown to the grand jury, had conspired and combined to restrain interstate and foreign commerce in shrimp and oysters in Mississippi waters by price-fixing. After trial by jury, petitioners were found guilty as charged (R. 896), and the Court of Appeals for the Fifth Circuit unanimously affirmed the convictions.

The indictment alleged that fishing operations in the area are conducted by the fishermen on a "joint

[1] Two other officials were indicted. One was acquitted by the district court, and the other died pending the appeal in the court below (R. 847–848).

venture basis" (Par. 4, R. 4); that the Association members "are not employees, workers, or laborers, but are independent businessmen engaged in business on their own account" (Par. 5, R. 5); and that "No employer-employee relationship" exists between fishermen and the approximately twenty-two Mississippi dealers to whom the catch is sold (*ibid.*)

The evidence shows that all commercial shrimp and oyster fishermen operating out of Mississippi ports are members of the Association (R. 455), including both crewmen and boat captains (R. 456). The boat captain alone selects his crew, both as to number (R. 563) and as to personnel (R. 135, 141, 192, 240, 283), and he alone is in charge of actual fishing operations (R. 489).

Members of the Association sell their catches directly to the dealers (R. 455). In order to do business with members, the dealers are required by Association rules to pack both shrimp and oysters (R. 543, 661, 760), to furnish ice without charge (R. 456, 127, 128), and to buy all catches offered to them by the fishermen (R. 255). The fishermen, however, are personally responsible for all expenses incurred on the voyage (R. 456, 457). Hence, the proceeds of each sale are first applied to expenses, after which the balance is equally divided among the boatowner, captain, and each crewman (R. 138, 370, 395, 456, 584). If, however, expenses are greater than the proceeds, the fishermen receive nothing (R. 318, 457).

Although most of the larger boats are owned by dealers (R. 513), the "big majority" of the smaller boats are owned by the fishermen themselves (R. 513).

Many of these fishermen purchase their own licenses (R. 300) and sell their catches to anyone they please (R. 287). Other fishermen own their boats but operate them under boat licenses purchased by the dealers, as required by an Association rule (R. 491, 539, 69). Although generally these fishermen sell to the dealer who purchased the boat license (R. 457), they may, and frequently do, sell to other dealers (R. 58, 756). Fishermen operating boats owned by the dealers agree to sell their catch to the boatowner (R. 283, 665), but may sell to other dealers to obtain a higher price (R. 135) or to prevent spoilage (R. 457).

Regardless of the type of boat used, all Association members are prohibited from selling shrimp or oysters below the prices set by the Association. Any member violating this prohibition is subject to a fine (R. 489, 535), suspension (R. 535), or forfeiture of the proceeds of the sale (R. 372).

In addition, the dealers were forbidden to purchase shrimp and oysters at prices below those fixed by the Association (R. 106, 462) or from nonmembers without the Association's consent (R. 60, 63, 65, 83, 106, 175, 229, 462). The Association compelled adherence to this rule by: boycotts (R. 322, 373, 460, 463, 650) and mass picketing (R. 104, 184, 235, 259, 355, 463, 672) of recalcitrant dealers;[2] by threats and

---

[2] In July, 1951, the Association staged a "strike" to prevent nonmembers from unloading and selling their catches at Pascagoula. Evidence showed that the Association had called in all boats a week before (R. 674), that petitioner McVeay advised witness Dees of the strike the night before (R. 354), and that the Association paid for food for pickets (R. 611, 677) and for petitioner Simmons' trip to Pascagoula (R. 489, 546). When

other intimidation (R. 180, 184, 235, 237, 271); by physical violence to both person and property (R. 178, 180, 184, 214, 220, 234, 257, 259, 273, 355, 368); by preventing out-of-state fishermen from fishing in Mississippi waters or selling to Mississippi dealers (R. 83, 212, 235, 271, 273, 322, 462, 463, 532);[3] by compelling such fishermen to join the Association and observe its price schedules (R. 65, 103, 106, 175, 217, 229, 274, 662–663); and by preventing shipment of shrimp and oysters from other states to Mississippi packers (R. 63, 65, 541). Members who fail to boycott or picket recalcitrant dealers when directed to do so by the Association are subject to fines and other penalties (R. 291, 360, 536, 683).

The Association's prices, according to the testimony of the individual petitioners and others, were fixed by the Association's "price control committee" (R. 491, 459–460), in conjunction with certain dealers (R. 384, 509, 512, 534, 588, 619, 707, 766). The prices, once adopted, were binding on all dealers, however, regardless of whether they had any part in the setting of the prices (R. 772).

In upholding the convictions, the Court of Appeals in a careful opinion held that the indictment properly alleged a violation of the Sherman Act; that the

---

asked whether the Association authorized the "strike," defendant Strong (now deceased) answered: "The members did it and I guess we were responsible for it, sure" (R. 677).

[3] Defendant Simmons, for example, admitted in a written statement (R. 462): "We do try to prevent boats manned by fishermen who are not members of our union from coming into our dealers and dumping their catch on our dealers, underselling our men and running our fishermen off."

court's charge to the jury was adequate; that the court had not erred in refusing to give petitioners' requested instructions; and that the evidence was sufficient to present a jury question whether petitioners had engaged in unlawful price-fixing (Pet. 40).

ARGUMENT

1. Petitioners contend (Pet. 16–20) that the "objects and purposes" clause of the Association's corporate charter (R. 45–46) shows that it is a labor organization; that a labor organization is not subject to Sherman Act prohibitions (*United States* v. *Hutcheson,* 312 U. S. 219) unless it combines with non-labor organizations (*Allen-Bradley Co.* v. *Local No. 3,* 325 U. S. 797); and that therefore the indictment is fatally deficient for failure to allege a combination between the Association and non-labor organizations.

The indictment, however, alleges that the members of the Association "are not employees, workers or laborers * * * but are independent businessmen engaged in business on their own account" (R. 5)—an allegation which must be taken as true in determining the sufficiency of the indictment. *United States* v. *Cook,* 17 Wall. 168, 178. Furthermore, the sufficiency of an indictment turns exclusively upon its allegations and the statute (*Local 36, Int'l Fishermen and Allied Workers of America* v. *United States,* 177 F. 2d 320, 326 (C. A. 9), certiorari denied, 339 U. S. 947; *United States* v. *Empire Hat & Cap Mfg. Co.,* 47 F. Supp. 395, 398, 401 (E. D. Pa.)), and there can be no recourse to facts outside the indictment, including self-serving statements in the corporate charter.

Since the indictment alleges that the Association is *not* a labor organization and presents "a plain, concise and definite written statement of the essential facts constituting the offense charged" (F. R. Crim. Proc. 7 (c)), the question of combination with non-labor organizations is immaterial in determining its sufficiency. As petitioners concede (p. 20), moreover, an indictment need not negative exemptions where, as here, the exemption is not part of the statute defining the offense. *McKelvey* v. *United States,* 260 U. S. 353, 356–357; *Edwards* v. *United States,* 312 U. S. 473, 482–483; *United States* v. *Cook, supra,* at 173–174.

Finally, the "objects and purposes" clause of the Association's charter, even if taken at face value, does not necessarily establish the Association as a labor group. The provision (R. 45–46), which emphasizes "the matter of securing better prices for our catches," is equally consistent with the indictment's allegation that the Association is composed of independent businessmen. In any event, petitioners can hardly defend on the ground that the Association's acts were "ultra vires." The test of liability is, of course, how the group in fact operates, and not how it labels itself. Cf. *United States.* v. *American Tobacco Co.,* 221 U. S. 106, 180–181.

2. Petitioners also attack the sufficiency of the trial court's instructions to the jury with respect to their claim that the Association is a labor organization and hence exempt under the Sherman Act (*United States* v. *Hutcheson,* 312 U. S. 219). In this connection, they contend (Pet. 11–12, 21–22) that the District Court failed properly to submit to the jury the question whether the members of the Association

were employees of the dealers to whom they sold their catch.

At petitioners' request, the trial court instructed that "unions and members of the unions" possess the rights to strike and exercise other concerted pressures (R. 838) and "to bargain collectively" (R. 840), and that the jury should return a verdict of Not Guilty if it should "find from the evidence, or lack of evidence, that the Defendants are a labor union, consisting of laborers and employees * * *" (R. 840).[4] These instructions left it to the jury to determine whether the Association was "a labor union, consisting of laborers and employees," and we submit that no further or more detailed instructions were required.[5]

If anything, as the court below held (Pet. 38), these instructions were more favorable than those to which petitioners were entitled. The only conduct which the Clayton and the Norris-LaGuardia Acts legalize under the antitrust laws are certain acts (specified in § 4 of the Norris-LaGuardia Act) which are done in the course of a "labor dispute" as defined in § 13 of the Norris-

---

[4] The jury was also instructed that "even if you find that the Defendant Association is a *chartered labor organization*," it may nevertheless not conspire with nonlabor groups (R. 842).

[5] Petitioners rely (Br. 22) upon a number of Jones Act cases holding that it is a jury question whether a fisherman injured on a packer-owned boat is an employee of the packer. Aside from the objection to relying on Jones Act cases to determine whether an association is a labor union for Sherman Act purposes, it is clear that the many fishermen who own and operate their own boats could not be "employees" of the packers even for Jones Act purposes.

LaGuardia Act. *United States* v. *Hutcheson,* 312 U. S. 219. Here there was no "labor dispute" because the controversy concerned, not "terms or conditions of employment" (Norris-LaGuardia Act § 13), but only "the sale of commodities" (fish) to which "the Act was not intended to have application." *Columbia River Packers Ass'n., Inc.* v. *Hinton,* 315 U. S. 143, 145.[6] See Statement, *supra,* pp. 3–4. Since petitioners' conduct here, as in *Columbia River Packers,* fell outside the area of a "labor dispute," no further instructions under the Norris-LaGuardia and the Clayton Acts were warranted.

At all events, regardless of whatever labor exemption petitioners might otherwise have had, such exemption was lost when they combined with the dealers to fix prices. This combination was not only admitted by petitioners at the trial but in fact was shown by petitioners' own evidence. See Statement, *supra,* p. 5. The case thus falls squarely within the rule of *Allen-Bradley Co.* v. *Local No. 3,* 325 U. S. 797, that restraints by labor groups in combination with business organizations are subject to the Sherman Act. See also *Local 36* v. *United States,* 177 F. 2d 320, 332 (C. A. 9), certiorari denied, 339 U. S. 947; *McHugh* v. *United States,* 230 F. 2d 252, 254–255 (C. A. 1), certiorari denied, 351 U. S. 966; *Hawaiian Tuna Packers* v. *International Longshoremen's and*

[6] *Columbia River Packers* was followed in *Local 36, International Fishermen* v. *United States,* 177 F. 2d 320, 330 (C. A. 9), certiorari denied, 339 U. S. 947; and *Hawaiian Tuna Packers* v. *International Longshoremen's and Warehousemen's Union,* 72 F. Supp. 562, 566 (D. Hawaii).

Warehousemen's Union, 72 F. Supp. 562, 567 (D. Hawaii); cf. *Manaka* v. *Monterey Sardine Industries,* 41 F. Supp. 531, 536 (N. D. Calif.).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no other reason appears for the grant of review. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
ERNEST L. FOLK III,
Attorneys.

NOVEMBER 1956.

APPENDIX

Section 1 of the Sherman Act, 50 Stat. 693, 15 U. S. C. 1, provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *.

Section 20 of the Clayton Act, 29 U. S. C. 52:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may law-

fully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 4 of the Norris-LaGuardia Act, 29 U. S. C. 104:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13 (c) of the Norris-LaGuardia Act, 29 U. S. C. 113 (c):

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

U. S. GOVERNMENT PRINTING OFFICE: 1956

JAN 18 1957

JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 480

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS AND WALTER McVEAY,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

ALBERT SIDNEY JOHNSTON, JR.,
Suite 3-5 Schwan Building,
Biloxi, Mississippi,
Counsel for Petitioners.

HOWARD A. McDONNELL, ESQ.,
Barq Building,
Biloxi, Mississippi.

C. PAUL BARKER, ESQ.,
Carondelet Building,
New Orleans, Louisiana,
Of Counsel.

INDEX

Subject Index

	Page
Petition for rehearing on denial of Certiorari	1
Basic Facts	1
Argument	2
Intervening Circumstances of Substantial and Controlling effect	5
Conclusion	7

Table of Cases Cited

DeLoach v. *Hicks*, 50 Ga. App. 239, 177 S. E. 822	4
Hamilton v. *U. S.*, 221 F. 2d 611	4
Hyde v. *United States*, 115 F. 2d 816, 821	4
Sample v. *Romine*, 2 So. 2d 257, 193 Miss. 706	3
United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U. S. 395, 67 S. Ct. 775	5
United States v. *Ogilvie Hardware Co.*, 67 S. Ct. 997, 330 U. S. 709, 91 L. Ed. 1192	3
Yearwood v. *Peabody*, 45 Ga. App. 451	3

Statutes and Authorities Cited

United States Code Annotated, Title 12, Section 592	4
Social Security Act, as amended:	
Section 210	5
Section 205 (b)	5
Section 205 (c)	5
Act of Congress of July 2, 1890, as amended, Section 1	2
M. Company, S. S. T. 387, reported in C. B. 1940-1, page 192	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 480

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS AND WALTER McVEAY,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Your petitioners, Gulf Coast Shrimpers and Oystermans Association, Louis S. Simmons and Walter McVeay, respectfully pray for a rehearing of the order of this Court dated December 3, 1956, denying their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Basic Facts

This is an action under the Sherman Anti Trust Law begun by indictment filed in the District Court for the Southern District of Mississippi, charging that petitioners, together with Leon Strong, now deceased, and other persons to the Grand Jurors unknown, engaged in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce among the several states and with foreign nations in shrimp and oysters in violation of Section 1 of the

Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act, and said combination and conspiracy consisted of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown. In said indictment the individual defendants are defined as independent businessmen and joint adventurers, and the corporation defendant is stated to be a Mississippi Corporation, shown by its charter to be a labor union. Although the evidence, in part, for and against petitioners refers to price and sale of seafood petitioners testified and claimed they were paid for their labor on a "lay" share at so much per barrel for such lay shares represented by their share slips furnished to them by the factory dealers. The only question remaining would seem to be the legality of such arrangement by the fishermen-crewmembers with the factory dealers, whether such fishermen-crewmembers were independent businessmen and/or joint adventurers, or whether the latter were employees of the factory dealers, receiving a lay share of the catch in lieu of wages at so much per hour, day or week, so as to be exempt from the proscriptions of the Sherman Act.

Argument

Petitioners assign the following reasons for granting this petition:

The decision of the court below is so far a disregard of the principles of law generally applicable to situations involving joint adventurers as to call for the exercise of the supervisory powers of this court. To illustrate, there must be a joint proprietary interest and right of mutual control for the existence of a joint adventurer, and the joint purpose and proprietary interest and control distinguish joint adventurers from tenancy in common; and, too, there must be an agreement, expressed or implied, for sharing of profits

in a joint adventure. The question for ultimate decision, whether petitioners were joint adventurers, must be determined by applicable Mississippi law. The decision of the court below to the effect that the relationship of the petitioners to the factory dealers was that of joint adventurer, and not of employer and employee, is contrary to the decision of this Court in *United States* v. *Ogilvie Hardware Co.*, 67 S. Ct. 997, 330 U.S. 709, 91 L. Ed. 1192, where the court held that the determination of a joint adventure necessitates application of state law. The decision of the court below is also contrary to the generally accepted principles of law that whether or not there is a joint adventure is a fact question, and, for practical purposes, the test to be applied is the same as for determining the existence of a partnership.

If the determination of a joint adventure must rest on the application of state law, United States v. Ogilvie Hardware Co., supra, then, inevitably, the rule announced by the Supreme Court of Mississippi in *Sample* v. *Romine*, 8 So. 2d 257, 193 Miss. 706, adhering to the majority rule, must be applied here. In the cited case, the Mississippi Supreme Court held there must be a joint proprietary interest and right of mutual control for the existence of a joint adventure, and since the question whether or not there is a joint adventure is a fact question the court below should have reversed the case and remanded to the District Court to permit and require petitioners to have a jury trial of such question.

Bearing upon the question whether or not petitioners were independent businessmen, as charged in the indictment returned against them, we refer the court to the case of *Yearwood* v. *Peabody*, 45 Ga. App. 451, holding that "independent business," within statute providing employer is not responsible for employee's torts in exercising independ-

ent business, means business or employment separate and independent from employer's business. See also *DeLoach* v. *Hicks*, 50 Ga. App. 239, 177 S. E. 822, to the same effect.

The decision of the court below to the effect that "while portions of the testimony might have justified a clearer submission of factual issue of whether the captains and crewmembers operating the dealer-owned boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers," is contrary to and in conflict with the decision of the Fourth Circuit in *Hyde* v. *United States*, 115 F 2d, 816, 821, and cases there cited holding that an instruction, in prosecution under 12 U.S.C.A. § 592, for alleged false entry by National Bank official, excluding consideration of testimony as to defendants asking advice as to particular transaction from reputable bankers, was erroneous as excluding showing of good faith. The holding of the court below lends conjecture and surmise to what the jury might have done if it had been properly instructed as to whether or not the captains and crewmembers were employees of all or only a part of the boats involved in the trial of the cause; and it does not do justice to petitioners to speculate what the jury would have done had they been properly instructed by the trial court. And the holding of the court below is in conflict with the decision of the Fifth Circuit in *Hamilton* v. *U. S.* 221 F 2d 611, of which petitioners were not advised when they filed their original petition herein holding that defendants requested instructions on defenses available under the evidence should have been granted and the matter submitted to the jury by correct instructions, regardless of the trial courts' opinions about defendant's guilt. The

opinion of the court below would substitute the judgment of the court for what is stated the jury might have decided, and what the trial court might have instructed the jury. Since it is well settled by this court that a trial court may never instruct a jury to return a verdict of guilty against a defendant no matter how strong the evidence, *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395, 67 S. Ct. 775, the opinion of the lower court would substitute its judgment for that of both the trial court and the jury. Such action does not comport with fair play, and is so far a disregard of recognized procedure in criminal trials as to call for the exercise of the supervisory powers of this court.

Intervening Circumstances of Substantial and Controlling Effect

Since the denial of the petition on December 3, 1956, numerous proceedings have been instituted by the Federal Government to impose and collect F. I. C. A. taxes, and other moneys from persons occupying the status of the factory-dealers involved in this cause. Respondent is contending that the factory-dealers are employers and the fisher-crewmembers employees. In the case or matter of Oscar T. Chinn, Social Security Account No. 426-24-7371, the Social Security Administration has ruled that the services rendered by persons occupying the position of fisher-crewmembers constitute employment within the meaning of Section 210 of the Social Security Act, as amended, and of the applicable regulations of the Social Security Administration. In a decision made pursuant to the provisions of Section 205 (b) and (c) of the Social Security Act, as amended, the Social Security Administration ruled that the services performed by said Oscar T. Chinn for the Biloxi Canning and Packing Co. and the B. Taltavull

Shrimp and Oyster Co., Limited of Biloxi during the period January 1, 1950 through February 8, 1954, and February 29, 1954 through February 18, 1955, under the same working agreement and conditions involved in our case, constituted an employer-employee relationship between said Oscar T. Chinn and said Companies.

To the same effect is the decision in the matter of the *M. Company, S. S. T.* 387 reported in C.B. 1940-1, page 192 holding that crewmember fishermen such as the individual petitioners in our case, are subject to the F. I. C. A. tax.

There is now pending before the appellate staff in the City of Jackson, Mississippi the case of the Williams Packing and Navigation Co., involving the questions of liability for unemployment and Social Security tax to the Federal Government. And counsel for petitioners are advised that the mentioned cases are but a few of those now pending throughout the United States. While it is recognized that no principle of res judicata or estoppel operates to bar the government from maintaining this Sherman Act prosecution "merely because one of its welfare agencies makes a determination from undisclosed testimony seemingly contra to the government's instant claim that a controlling percentage of these fishermen were not employees but were independent businessmen or joint venturers with the dealers for whom they operated," as said by the Court of Appeals for the Fifth Circuit in our case, we believe it too well settled for further argument that this Court will not recognize and enforce one rule of law in a criminal case and a different rule in a civil case involving taxation where the government seeks to collect taxes because of the very acts and relationships it denounces in the criminal prosecution, especially so when the employment now being taxed is well recognized by the decided cases cited in the original petition filed herein.

Our case is now presented for rehearing on the basis of a conflict in the decisions between the other Circuits mentioned above and this court not heretofore known to exist, in addition to the grounds asserted in the original petition which we believe to be meritorious.

Since this court has often cautioned that its denial of a petition for certiorari is not to be construed as a decision on the merits, we urge the court to grant certiorari and permit a decision on the merits of the several contentions of petitioners which we believe to be meritorious.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit be reheard and vacated and that the petition be granted.

Dated: January 16, 1957.

ALBERT S. JOHNSTON, JR.,
Counsel for Petitioners.

Certificate of Counsel

The undersigned, Albert Sidney Johnston, Jr., Attorney for petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58, of the Supreme Court of the United States, effective July 1, 1954, and that said petition for rehearing is not interposed for delay.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

Proof of Service of Petition

STATE OF MISSISSIPPI,
Harrison County

Personally came and appeared before me, the undersigned authority in and for the aforesaid county and state, the within-named Albert Sidney Johnston, Jr., who after being by me first duly sworn on oath said that he is attorney for the petitioners in the above-entitled cause and as such authorized to make this Certificate, and that he served a copy of the above and foregoing petition for rehearing on J. Lee Rankin, Esq., Solicitor General of the United States by mailing a true and correct copy thereof to said J. Lee Rankin, Esq., postage prepaid to his office in Washington, D. C. on this the 17 day of January, A. D., 1957.

ALBERT SIDNEY JOHNSTON, JR.,
Affiant.

Sworn to and subscribed before me on this the 17th day of January, A. D., 1957.

JULES A. SCHWAN,
Notary Public.

(Seal)

My commission expires 11/22/58.

(3453-8)